to avoid conformity with local rules of practice which did not seem just and reasonable, with the result that an immense number of precedents for non-conformity have been established, destroying to a large extent the very uniformity in procedure which it was the purpose of the ACT to establish.

On the surface, the proposed regulation of federal procedure by the Supreme Court aims only to recognize the actual divergence between State and federal practice and to improve the latter in a systematic fashion. This would be a great gain in itself, for the present hybrid practice in the federal courts is intrinsically unsatisfactory and creates confusion as between the various federal districts.

But the real effect of a uniform system of federal practice would almost certainly be far greater than this. The States have been groping about more or less blindly for seventy years trying to reform procedure. The early promise of the FIELD CODE has not been fulfilled. The "CODE" is in large measure a failure. Statutory modifications of the common law system have been tried again and again with indifferent success. They all failed in the most vital place,—they were fixed and mandatory legislative enactments imposed upon the courts, instead of rules by which the courts guided their own efforts to do justice to litigants. In a few conspicuous instances, such as New Jersey in 1912, Colorado in 1913, and Virginia in 1916, the States themselves have taken up the court-rule system of procedure, but progress has been exceedingly slow.

If, now, the Congress of the United States approves the court-rule plan, and it is put into effect with the wisdom and ability which we have the right to expect from the United States Supreme Court, the movement for reform along this line, so successfully pursued in England and Canada, will gain enormous force and prestige, and it will very likely become the dominant system among our States. But more than that may confidently be expected. An effective system of court rules will be put into operation in the federal courts sitting in each State, and that system will undoubtedly tend to become the model for the systems which may be looked for in the several States. The merit of the federal Supreme Court rules ought to be enough to commend them generally, but the great additional advantage to accrue from identity of procedure in the State and federal courts will exert a still more powerful influence.

Procedure thus seems to enjoy a unique position in the United States. It is the only subject of legislation over which the federal authorities have full coordinate jurisdiction with the States, and it offers the only opportunity for a federal system to serve as a model for State adoption. So that procedure, which has lagged so long and suffered so many vicissitudes, bids fair to become one of the pioneers of uniformity. E. R. S.

WHAT WORDS CREATE A POWER?—As the right to sell may exist either as a result of ownership, or by virtue of a power without or independent of ownership, it is sometimes a question whether words indicating a right to sell, contained in an instrument granting an estate, are intended to give a power, or are merely descriptive of the rights incident to the estate given.

When property is devised without any designation of the estate given, and the devise is followed by words indicating that the devisee is to have the right of absolute disposal in fee, or to sell in fee, it has often been held that the words indicating an absolute power of disposal show that the devisee was intended by the testator to have an estate in fee, not a life estate with a testamentary power of appointing the reversion. (See note 18 L. R. A. N. S. 463.) If the devise were expressly of an estate for life, no such inference could be indulged; and it would have to be held that the right of disposal given was merely a testamentary power to appoint the reversion.

Again, it has happened that testators have given estates expressly for life only, with vague words as to the right of disposal, putting the court into a quandary as to whether the testator was speaking of a testamentary power or of the right of disposal incidental to ownership of a life estate. Thus in the case of *Bradly* v. *Westcott* (1807), 13 Ves. 445, it was held by Sir WM. GRANT, M. R., that the following words indicated not a testamentary power in addition to the life estate, but merely freedom from bond and accountability for use: After minor bequests and direction to pay debts, the testator gave all his moneys, stocks, household goods, and other personal property to his wife, Elizabeth, "for and during the term of her natural life; to be at her full, free, and absolute disposal and disposition during her natural life, without being in any wise liable to be called to account of or concerning the amount, value, or particulars thereof, by any person or persons whomsoever; and from and after her decease" he gave what she should be possessed of at the time of her death to others. Many cases of this sort are to be found in the books.

A similar conclusion was reached by the Supreme Court of the United States in the case of *Brant* v. *Virginia Coal & Iron Co.* (1876), 93 U. S. 326, on the following words: "I give and bequeath to my beloved wife, Nancy Sinclair, all my estate, both real and personal, to have and to hold during her natural life, and to do with as she sees proper before her death." But in rendering the opinion, Mr. Justice FIELD, after reviewing *Bradly* v. *Westcott,* and similar cases, declared: "Numerous other cases to the same purport might be cited. They all show, that where a power of disposal accompanies a bequest or devise of a life-estate, the power is limited to such disposition as a tenant for life can make, unless there are other words clearly indicating that a larger power was intended." In other words, that a power of disposal given to a life tenant is no power at all, unless the words used indicate that the life-tenant was to have greater powers of disposal over the property than a life estate gives. With deference to this great judge, it is submitted that the cases cited show nothing of the sort. It may be true that the fact that the person claiming the power is by the same instrument given an estate, from which a certain right of disposal results, may require clearer words to create a power to him than if no estate were given him. But the books are full of cases in which an estate expressly for life, with power of sale or disposal, have been held to give power to sell in fee, indeed, that is the only rational as well as the usual construc-

tion.[1] Powers to life tenants have often been implied merely from gift over of "what remains."[2]

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[1] Lewis v. Palmer (1878), 46 Conn. 454, was a devise to a sister "during her natural life, and for her to dispose of as she may think proper, right or just; and I do hereby give power and authority to my executrix to sell real or personal property as she may think best to make my estate clear from debt." Who was executrix does not appear, nor that the life tenant sold to pay debts; but the court after discussing several cases as to construction of powers of disposal to life tenants held that the right to sell in fee was to be presumed.

In Bouton v. Doty (1897), 69 Conn. 531, 39 Atl. 1064, a power to mortgage the fee was held to be included in a reservation by deed to the grantor of a life estate "with full power to mortgage said premises to raise money for my own personal benefit at any time I may desire for and during my natural life." To the same effect is Security Co. v. Pratt (1894), 65 Conn. 161.

Wood v. Owen (1910) 133 Ga. 751, 66 S. E. 951 holds that a power to sell in fee was given by a devise to a wife "without limitation or reserve, for her to do as she thinks best" for herself and his children, "and I make Archa M. Wood equal with the rest of my heirs."

Simpkins v. Bales (1904), 123 Iowa 62, 98 N. W. 580, holds that title in fee simple passed by the deed of the widow to whom testator devised property "to be used and enjoyed and disposed of as seemeth the best to her, during her natural life or so long as she remains my widow," and after her death to his children.

Hamilton v. Hamilton (1910), 149 Iowa 321, 128 N. W. 380.

In Fink v. Leisman (1896), 18 Ky. L. Rep. 710, 38 S. W. 6, a power to sell in fee was held given by a gift by will to testator's wife of all his "personal, mixed, and real estate property during her lifetime, with full power and authority to sell property if she sees proper."

Bodfish v. Bodfish (1909), 105 Me. 166, 73 Atl. 1033, discusses the implication of a power to sell in fee to the widow to whom the estate expressly for life was given in the absence of any declaration that she might sell, holding there was no warrant for such implication on the facts. But such a power was found in Young v. Hillier (1907), 103 Me. 17, 67 Atl. 571.

Cummings v. Shaw (1871), 108 Mass, 159, holds that power to pass a fee was given by a devise "for and during his natural, with right to dispose of the same."

Woodbridge v. Jones (1903), 183 Mass. 553, 67 N. E. 879, was a devise and bequest of residue real and personal "to my wife during her life, to use and dispose of the same as she may think proper, with remainder thereof on her decease, one-third to the heirs of my brother," &c.; and the court held a power to sell in fee was given the wife.

In Hoxie v. Finney (1888), 147 Mass. 616, 18 N. E. 593, a sale in fee reserving to herself a life estate was held authorized by the words: "I do give and bequeath to her the use and improvement of my whole estate, both real and personal, with liberty to use and appropriate so much of the principal, in addition to the income as she may deem necessary for her comfort and support; and I authorize her to sell and dispose of the whole or any part of my real and person estate at her discretion."

Gaven v. Allen (1889), 100 Mo. 293, 13 S. W. 501, was a devise and bequeath of residue to a wife without words of limitation, making her and another executors, and adding: "My will is that my said wife shall or will not dispose of my aforementioned fee simple and leasehold property without the written consent to the same of my brother"; and it was held she had a power to sell in fee.

Griffin v. Nicholas (1909), 224 Mo. 275, 123 S. W. 1063, was a devise to a wife "to have and to hold and enjoy for and during her natural life, with full power to make such disposal thereof as may be necessary for her own comfort and support"; and the court held it was a power to sell in fee, saying: "The words conferring the power would be idle if they only meant that she could sell her life estate."

Parks v. Robinson (1905), 138 N. C. 269, 50 S. E. 649, holds that the objection that plaintiff could not convey title in fee according to the contract sued on was not

well taken, plaintiff claiming under a devise by her husband "to my beloved wife, Ann Parks, during her natural life and at her disposal"; and after reviewing several cases the court mentioned Brant v. Virginia Coal Co., saying, "We are of opinion that the more reasonable view, certainly where there is no limitatton over, is found in the decisions of this and other courts which we have cited."

Bishop v. Remple (1860), 11 Ohio St. 277, was a decision that a power to sell in fee was given by the words: "I give, devise, and bequeath to my beloved wife, Elizabeth, all and singular my goods and property as may remain after all claims against my estate are satisfied, with full power to have and to hold, to sell and convey the same during the term of her natural life," and "after her death any moneys or effects of my estate that may remain," etc.

Forsythe v. Forsythe (1884), 108 Pa. St. 129, was a devise of all property real and personal to wife "during her natural life, with power to dispose of the same as she may think best"; and it was held that her absolute disposition by will was authorized.

Shields v. Netherland (1880), 73 Tenn. (5 Lea) 193, was a devise of land to a daughter and her husband "to dispose of as they may think proper," followed by a codicil declaring, "it is not my intention to make the estate a fee simple" if the husband survives; but they "shall have power during their joint lives, to dispose of the lands devised to them, by deed executed by them jointly," etc.; and this was held to be a power to sell in fee absolute.

White v. White (1849), 21 Vt. 250, holds that power to sell in fee was given by a devise to the wife "to have at her disposal during her natural life or so long as she remains my widow."

Englerth v. Keller (1901), 50 W. Va. 266, 40 S. E. 468, was a devise of residue after paying debts, to wife "to be enjoyed by her during her natural life, but if at any time she may wish she shall be at liberty of selling a portion of the real estate that she may think to her interest, and in that case her conveyance shall be valid"; and the court after reviewing the decisions declared that a power to a life tenant to sell, means in fee, wherefore her deed in fee was good.

Wood v. Amidon (1875), 2 MacArthur (D. C.) 224, holding a life estate and power to sell in fee passed by devise to wife for life, she to pay debts, raise children, and to give them portions on becoming of age, and to do with the estate as she may think best for herself and the children.

Schreiner v. Smith (1889), 38 Fed. 897, was a devise of all property real and personal to a wife, "to have and to hold during her natural life unless she marry. * * * The personal estate, before such marriage she may dispose of as her necessities may require." This was held to enable the widow to dispose of the personal property absolutely without liability to account for the proceeds.

[2] A gift of "what may remain" after the death of the life tenant does not imply a power in the life tenant if any of the property given is perishable or liable to diminish by use: Bramell v. Cole (1896), 136 Mo. 201, 37 S. W. 924, 58 Am. St. 619; Thompson v. Adams (1903), 205 Ill. 552, 69 N. E. 1; Hunter v. Hunter (1900), 58 S. C. 382, 36 S. E. 734, 79 Am. St. 845; Herring v. Williams (1911), 158 N. C. 1, 73 S. E. 218, reviewing numerous cases.

In Clark v. Middlesworth (1882), 82 Ind. 240, a power to sell in fee was held implied by a devise to testator's wife "during her life, and at her death if anything should remain, the same to be divided among my heirs-at-law." Approved in Downie v. Buennagel (1883), 94 Ind. 228, 234; Cushman's Estate (1890), 134 Ill. 88, 24 N. E. 963; Foudray v. Foudray (1909), 44 Ind. App. 444, 89 N. E. 499.

To the same effect: Harris v. Knapp (1839), 39 Mass. (21 Pick.), 412; Ramsdell v. Ramsdell (1842), 21 Me. 288.

Wenger v. Thompson (1905), 128 Iowa 750, 105 N. W. 333, holds a gift to wife for her own use for life and to educate and maintain his children, and after her death all the property then remaining in her possession, or the proceeds to be divided, gives her a power to sell in fee.

Young v. Hillier (1907), 103 Me. 17, 67 Atl. 571, holds that a gift over of what may remain on the death of the tenant for life, implied such a power in the life tenant as enabled her to sell in fee whereby the remainder was defeated.

That Mr. Justice FIELD's doctrine has no acceptance in the older cases and is unknown in England, is vouched from never noticing it in a considerable reading, failure to discover it by careful search of texts that should mention such a doctrine if there be one, and by the very explicit recognition of the opposite and more sensible rule, as illustrated in the case of *Vivian* v. *Jegon* (1868), L. R. 3 House of Lords Rep. 285. In this case the testator gave certain property to trustees to pay debts, &c., and other real estate to his daughter during the term of her life without impeachment for waste, declaring "it shall be lawful for my said daughter to work, or contract for, lease, or set out to be worked" mines then known or later discovered, the net proceeds therefrom to be paid to the trustees and invested, the income to be paid to the daughter for life. The daughter made a mining lease for twenty-one years and died a few months later. For the lessee it was argued: "It could not have been intended to be restricted to the granting of a lease for life. That would be contrary to the practice of law and the object of the testator. A gift of an estate for life carries with it the power to make a lease for life, and the addition to the gift of the estate of a power of leasing, if intended to be restricted in this way would be perfectly needless, for every tenant for life may aliene the estate for his own life. When, therefore, the power is added to the gift of the estate, the fair construction is that the power is something different from and in excess of that which would have arisen as a mere accessory to the gift of an estate for life. *Hele* v. *Green* (1651), 2 Roll. Abr. 261, pl. 10, expressly recognized the principle, and declared that where there was a general power to a tenant for life to grant a term, the grant of a term beyond this life was good, though it might defeat the remainders over." In rendering his opinion in the case, Lord Chancellor CAIRNS said in part: "It is quite obvious that the power to the daughter to work the mines is a power which cannot be exercised after her death. It must be a power co-extensive with her own life. It would be somewhat singular, therefore, to find that one of the verbs here used should point to a benefit terminating so far as the daughter is concerned with her life; whereas another, the verb 'lease' should extend beyond her life to an indefinite period of time. But beyond these observations, I think there are in the latter part of this sentence, matters which indicate, beyond all doubt that what was here provided for was to take place in the lifetime of the daughter. The circumstances which, to my mind, are quite conclusive, are these: In the first place there is the provision that 'all the issues and neat proceeds and profits arising therefrom shall from time to time, as the same shall arise, be paid over by my said daughter to my said trustees and their heirs.' * * * And the only force, in fact which I myself felt in the argument of the appellant at your Lordship's bar, was this: It was contended that if you give an estate to A for life, and then give a general undefined power of leasing to A, inasmuch as the gift of the life estate would carry with it a power of leasing limited to the life of the tenant for life, the donee of the power; therefore, it was said it must be a necessary inference that in giving to the tenant for life a power to lease, a lease was meant going beyond the life incumbency." Lord CRANWORTH followed, saying in part: "My

Lords, I entirely concur in what my noble and learned friend has said, and I have very little to add. Had this power been simply a power to lease and work the mines there would have been (as my noble and learned friend has suggested) great force in the argument that something must have been intended more than the daughter would have had by virtue of her life interest. But that is not the object of this power. It is not so much a power as a restriction. What the testator says is this: If by virtue of your life interest you work these mines, mind I do not mean that you are to have the profits; whatever you get by so doing must be invested for the benefit of the fee simple of the estate. I think this is clearly what was meant. Without going the length of saying that, if the power of leasing the mines had been given *simpliciter,* without saying for how long, no case could arise in which you might say that it meant for ninety-nine years, at all events it must be an extreme case to enable you to come to such a result, and put such a construction on the words. But there is no necessity at all for it here."

Nevertheless, this dictum of Mr. Justice FIELD, wholly uncalled for by the facts of the case before the court, has in a number of later cases been accepted and acted on where the application of such a rule defeated the clearly expressed intention of the testator, illustrating how unnecessary dicta often produce bad law. The dictum is quoted in the following cases: *Giles* v. *Little* (1881), 104 U. S. 291, holding "to be and remain hers, with full power, right, and authority to dispose of the same as to her shall seem meet and proper so long as she shall remain[3] my widow," did not give a

[3] This doctrine is recognized in Kaufman v. Bredkenridge (1886), 117 Ill. 305, 7 N. E. 666, but power to sell in fee was found in the context: Dickinson v. Griggsville Nat. Bk., 111 Ill. App. 183, affirmed, 209 Ill. 350; Wardner v. Seventh Day Baptist, etc. (1908), 232 Ill. 606, 83 N. E. 1080, 122 Am. St. 138.

Smith v. Bell (1832), 31 U. S. (6 Peters) 68, cited and relied on by Mr. Justice Field in Brant v. Virginia Coal Co., and from which he probably got the idea stated in his proposition was a bequest of all personal estate, principally five slaves, to a wife "to and for her own use and disposal absolutely; the remainder after her decease to be for the use" of an only son. The only question discussed was whether the gift over to the son was void as repugnant to the absolute gift to the wife. No idea of a power was suggested: Marshall, C. J., in giving the opinion of the court said: "There were trifling and perishable articles, such as the stock on the farm, and the crops of the year, which would be consumed in the use, and over which the exercise of absolute ownership was necessary to a full enjoyment. These may have been in the mind of the testator, when he employed the strong words of the bequest to her. But be that as it may, we think the limitation to the son on the death of the wife restrains and limits the preceding words so as to confine the absolute power of disposition which they purport to confer of the slaves, to such a disposition of them as may be made by a person having only a life estate."

Smith v. McIntyre (1899), 95 Fed. 585, 37 C. C. A. 177, was a devise of the homestead to the wife for life in lieu of dower, and the personalty to the wife for life, "she, however, first disposing of sufficient thereof to pay my just debts"; and it was held the power was not confined to the personalty; and that she could sell the home in fee.

Cowell v. South Denver Real Est. Co. (1901), 16 Col. App. 118, 63 Pac. 994, merely holds that an explicit power to convey in fee given to the widow made tenant for life and executrix was not well exercised because no purpose of the will required

power to the widow; *Henderson* v. *Blackburn* (1882), 104 Ill. 227, 44 Am. Rep. 780, holding "to have and to hold or to dispose of so much of the same as she may need or wish to use during her life time" and "after her death if there is anything left" gave her no power beyond her express life estate; *Patty* v. *Goolsby* (1888), 51 Ark. 61, 9 S. W. 846, holding the power extended only to the personal property, under the gift of "all my negroes, lands, stock" (&c.) "to have and to hold during her natural life, or until she may think proper to marry, with full power to sell and dispose of such property as she may think proper"; *Miller* v. *Porterfield* (1890), 86 Va. 876, 11 S. E. 486, 19 Am. St. 919, holding that no power was given by the words "to have and to hold the same for her own use and benefit, and also to make such disposition of the same that she in her judgment may deem best, should it become necessary that a part or all should become necessary for the support of herself," and "After the death of the said Elizabeth, I will and devise that any and all property remaining unused shall be given" &c.; and now comes the Supreme Court of South Carolina to add to the list of fatalities created by this dictum by deciding, after quoting it as above, and without even mentioning numerous prior decisions of the South Carolina court, including *Fronty* v. *Fronty* (1833), 1 Bailey Eq. 517, to the contrary on like facts, that no power is given by the words: "My wife, Jane, to have the right to dispose of any property as she may think best for the purpose of paying all just debts and supporting herself and children while she remains my widow"; and this merely because a previous clause of the will gave her a life estate in all his property. *Sheffield* v. *Graig* (1916), — S. C. —, 89 S. E. 664.

J. R. R.

WHAT OBLIGATIONS ARE INCLUDED IN THE DESCRIPTION OF "IMPLIED CONTRACTS?"—This question arose in the case of *People* v. *Dummer*, 113 N. W. 934, recently decided by the Supreme Court of Illinois. The state had brought suit in debt in the Municipal Court of Chicago against the defendant for taxes alleged to be due from him. By statute the municipal court was given jurisdiction over all actions on contracts, express or im-

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it (payment of debts or the like), but the court does cite the case of Brant v. Virginia Coal Co. with apparent approval.

Whittemore v. Russell (1888), 80 Me. 297, 14 Atl. 197, holds that a power is not given anyone by the following words because it is not said who shall sell: "I give to my wife the use of the remainder * * * during her natural lifetime, and after her decease it is to be equally divided between my children; the real estate may be sold if thought advisable."

Russell v. Werntz (1898), 88 Md. 210, 44 Atl. 219, sheds no light on the present discussion because the court and counsel discussed only the question as to whether the devisee took an estate in fee by a devise to her "to hold and dispose of as he may see fit while she remains single." But very strict interpretation of language giving powers in this state is indicated in the later case of Bauernschmidt's Est. (1903), 97 Md. 35, 54 Atl. 637, and Meister v. Meister (1913), 121 Md. 440, 88 Atl. 225.

Winchester v. Hoover (1902), 42 Ore. 313, 70 Pac. 1036, contains no power to the life tenant; it is "to have and to hold during her life, or while she shall remain unmarried, to pay my debts, to support herself, and to maintain and educate minor children"; but the court does quote and approve the dictum of Mr. Justice Field above quoted.